



1673 # 21 09-09-02
PATENT APPLICATION
OUR FILE NO. 20010483.COD
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Re App : Ronald O. Bubar
Serial No. : 09/535,067
Filed : March 23, 2000
For : LAMINATED PIZZA CRUST
: Art Unit 1761
: Examiner T. Tran Lien

BRIEF FOR THE APPELLANT

I. REAL PARTY IN INTEREST

The real party in interest in this Appeal is Jeno F. Paulucci, having an office at 201 West First Street, Sanford, Florida 32771, by virtue of an Assignment from the inventor, recorded June 19, 1998, at Reel 9352, Frames 97-100.

II. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to the patent owner, the patent owner's legal representative or the inventor which will directly affect or be directly affected by or have a bearing on the Board of Patent Appeals and Interferences in this pending Appeal to the present knowledge of the undersigned.

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III. STATUS OF CLAIMS

The present application was filed as a continued prosecution application on November 28, 2001, of prior application serial no. 09/535,067, filed on March 23, 2000, as a division of serial number 08/968,900, filed November 6, 1997 (now U.S. Patent 6,136,977), which is a continuation of serial no. 08/496,894, filed June 30, 1995 (now abandoned).

Upon the filing of the divisional application serial no. 09/535,067, a Preliminary Amendment canceled original claims 1-7, retained claim 8, and added new claims 9-12. The Examiner imposed a Requirement for Restriction between Group I containing claims 8-11 and Group II including claim 12. An election was made, without traverse, to prosecute the invention of Group II, namely, claim 12. Subsequently, by amendment dated May 8, 2001, claims 13-20 were added to the application. Claims 12-20 stand rejected. No claim has been allowed.

What Appellant believes to be a true copy of the claims presently under appeal appears in Appendix A attached to the end of this Brief.

IV. STATUS OF AMENDMENTS

All amendments submitted in this application and previous related applications are believed to have been entered and are presently considered to be of record. These include the Preliminary Amendment filed March 23, 2000, an Amendment of May 8, 2001, in response to a non-final Official Action dated November 8, 2000, a Preliminary Amendment filed in the continued prosecution application responsive to a final action dated July 31, 2001, a Response dated February 15, 2002, to an Official Action of December 17, 2001.

V. SUMMARY OF THE INVENTION

The present invention is directed to an improved crust for frozen pizzas that remains crisp, flaky and tasty following cooking of the frozen pizza in a microwave oven.

As is set out in the "Background of the Invention", of appellant's specification, there has been a long-felt need for a pizza crust used with frozen pizzas that can be more rapidly cooked in a microwave oven than in a conventional electric or gas oven. When such a conventional oven is used, it is first required that the oven be preheated to a temperature of about 375⁰-400⁰F, which may take three to five minutes to accomplish. Then, the frozen pizza is placed in the conventional oven and cooked for another 12 minutes or so to thoroughly heat the cheese, meat and tomato sauce toppings from their frozen state to a desired serving temperature. Thus, it is not uncommon to have to wait more than 15 minutes to prepare a 10 in. to 12 in. diameter pizza. During this time, the moisture content of the pizza crust is significantly reduced so that there is usually no problem with the crust being soggy and rubbery.

However, in an effort to minimize the time needed to cook a frozen pizza, microwave cooking has been attempted, but with less than satisfactory results. With existing crusts of the prior art, as the frost and ice crystals in the crust and topping melt, the crusts tend to become soft and soggy as the pizza toppings become heated to their serving temperature.

The laminated pizza crust dough of the present invention is unique in that it comprises a multi-layered laminated dough that incorporates a plurality of margarine layers distributed between layers of a proof-dough product, where the proof-dough is formed into a sheet and a margarine layer is extruded onto the sheet. The sheet is subsequently folded and further sheeted, such that the resulting dough, prior to baking, has a plurality of margarine layers distributed between layers of proof-dough. When the laminated crust dough is cut into a pizza shape and baked, the margarine becomes absorbed into the dough leaving stratified air pockets or voids. The resulting crusts are crispy and flaky, and are able to withstand application of various toppings, subsequent freezing and later microwaving without degrading the taste and texture of the crust.

VI. ISSUES ON APPEAL

The statutory provision of 35 U.S.C. §103(a) forms the sole basis for the rejection of claims 12-20, all of the claims on appeal. This rejection is based upon a single reference, namely, the Paulucci Patent 4,842,882.

As is set out in paragraph 7 of paper no. 3, it is the Examiner's position that the Paulucci '882 patent discloses a laminated crust comprising a plurality of fat layers distributed between layers of dough. The Examiner recognizes that Paulucci does not disclose the use of margarine, but asserts that it would have been an obvious matter of preference to substitute margarine for shortening, or vice versa. She further submits that it is well known in the art to use margarine, butter or shortening interchangeably in baked products but cites no prior art teaching that extruded margarine layers be interspersed with layers of proofed dough in forming pizza crusts.

In view of the foregoing, it appears that the sole issue to be decided in this appeal addresses the question as to whether the Paulucci '882 patent can be said to properly render the appealed claims to the present invention obvious within the meaning of 35 U.S.C. §103(a).

VII. ARGUMENTS

A. Grouping of Claims.

Appellant believes that each and every claim should stand or fall on its own merits and that the limitations of each should be considered separately. Appellant's product by process claims 12-20 are each directed to a particular combination of materials and steps utilized in the formation of a crust dough which when cut to shape and baked provides a significantly improved crust for frozen pizza products that are later to be cooked in a microwave oven. While the main thrust of the arguments will be directed to the independent claims, the dependent claims add limitations that should be considered on their own merits.

B. The Cited Art.

The Paulucci '882 reference is directed to a method of making dough crust product for use in the commercial manufacture of fresh or frozen pizzas. As stated therein, the main feature of the Paulucci '882 invention involves cooking in multiple stages or steps (see column 2, lines 4-14).

At column 9, line 58, a method is described in which raw dough is sheeted before any proofing and then layered with shortening flakes between the layers. The layered mass is then again sheeted using two sheeters in series. Only following the sheeting operation is the dough proofed for the first time in a high humidity environment and then docked using spike rollers. The docked laminated dough is then baked in a series of steps at different temperatures.

The resulting crust is described as being characterized by crisp upper and lower surfaces and a flaky, airy interior.

C. Authorities and Arguments.

In determining the propriety of a rejection under 35 U.S.C. §103, it is well settled that the obviousness of an invention cannot be established by combining the teachings of the prior art absent some teaching, suggestion or incentive supporting the combination. See *In re Fine*, 837 F.2d 1071, 5 USPQ 2d 159 (Fed. Cir. 1988). A test for obviousness is what the combined teachings of the references, taken as a whole, would have suggested to those having ordinary skill in the art. See *In re Kaslow*, 707 F.2d 1366, 217 USPQ 1089 (Fed. Cir. 1983).

During patent examination, the USPTO bears the initial burden of presenting a *prima facie* case of unpatentability. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ 2d 1442 (Fed. Cir. 1992). When the USPTO fails to meet this burden, the applicant is entitled to the patent. However, when a *prima facie* case is made, the burden shifts to the applicant to come forward with evidence and/or argument supporting patentability. Patentability *vel non* is then determined on the entirety of the record, by a preponderance of evidence and weight of argument. See *In re Paisecki*, 745 F.2d 1468, 223 USPQ 785 (Fed. Cir. 1984).

The burden for establishing a *prima facie* case of obviousness thus rests upon the Examiner and can only be satisfied by showing an objective teaching in the prior art or by

knowledge generally available to one of ordinary skill in the art that would have led such individual to combine relevant teachings of cited references.

The Examiner's rejection in the present application is based upon the teachings of a single reference. No reference has been cited to suggest that the proofing of a raw dough followed by the substitution of layers of extruded margarine for discrete flakes of shortening in the formation of crusts for frozen pizzas would suggest itself to persons of ordinary skill in the art. It appears to be the Examiner's unsupported conclusion that such a substitution would have been obvious. To counter the Examiner's position, Appellant submitted a first Declaration under 37 CFR 1.132, a copy of which attached hereto as Attachment I. Based upon his having worked for over 18 years in the field of "mass-produced dough-making", he considers himself to be a person skilled in the art of mass-production of dough-related products. Appellant further avers that he is "intimately familiar with" the crust-making example set out in the Paulucci '882 patent that is being relied upon by the Examiner in rejecting the claims on appeal. This familiarity is based on his having worked with Mr. Paulucci at Jeno's Inc. developing pizza crusts for use with frozen pizzas.

Appellant further avers in his 37 C.F.R. §1.132 Declaration that crust products made in accordance with Example 6 of the Paulucci '882 patent "are 'bready' products that have a porous, open, rounded internal cellular structure ... similar to the structure of a well-risen loaf of baked bread". The crust being claimed in the present application exhibits a vastly different texture, i.e., homogeneous layers of fat (margarine) that causes the finished crust to have a multi-layered, laminated structure somewhat like the interior of a croissant.

A fair reading of Appellant's Declaration of September 30, 1999, leads one to conclude that the striking difference in the texture of the crust, as claimed in the present application, and the crust produced in accordance with Example 6 of the Paulucci '882 patent is due to first proofing the dough and thereafter substituting extruded layers of soft margarine in a multi-folded, sheeted dough in place of discrete flakes of shortening that become pressed into the dough during sheeting thereof.

The Examiner rather summarily dismissed the Appellant's Declaration of September 30, 1999, deeming it "non-persuasive". The Examiner criticized the

Declaration as not presenting evidence to support a conclusion that the process of the Paulucci '882 patent produces bready products with porous, open, rounded, internal cellular structure that does not exhibit a significant layer separation and that the crust resulting when the dough of the present invention is baked has a flaked, multi-layered interior similar to the interior of a croissant.

In an attempt to satisfy the Examiner's requirement for a further evidentiary showing, Appellant submitted a second Declaration dated November 27, 2001, a copy of which is appended hereto as Attachment II for the convenience of the Board. Attached to the Declaration as "Exhibit 1" is an 8"x10" color photo of a cross-section of a once frozen, but later thawed and microwave cooked pizza, whose laminated crust dough is defined by the claims on appeal herein. A second photograph, identified as "Exhibit 2" is a similar photo of a slice pizza whose crust is like that produced in a pressed crust process, as described in the Paulucci '882 patent. The Board is respectfully urged to consider the photographic evidence, which Appellant believes clearly shows the textural difference between product made with crust dough in accordance with the present invention from that resulting when dough made in accordance with Example 6 of the Paulucci '882 patent is used.

In her Official Action of December 17, 2001, the Examiner repeated her earlier rejection of Claims 12-20 now on appeal "for the same reasons set forth in paragraph 7 of paper no. 3". She found Appellant's second Declaration of November 27, 2001, "non convincing". The criticism is that the Declaration does not state exactly how the pizza crust of the photograph of Exhibit 2 was made. While Appellant did not set out the step-by-step process, in paragraph 4 of his Declaration of November 27, 2001, he does state that he compared the texture of the pizza crust of the present invention **with that produced using the method described in the prior art Paulucci '882 patent**. In paragraph no. 6 of the Declaration, he states that the crust is produced by a process like that described in the Paulucci '882 patent.

In a further attempt to satisfy the Examiner's criticisms, Appellant submitted a Declaration of Jenö F. Paulucci, dated January 29, 2002 (Attachment III). Mr. Paulucci avers that he is the same individual named as inventor on the '882 patent, that he is very familiar with the methods used in his company over the years for producing baked pizza

crusts and, in particular, that he is familiar with the product produced using the method of Example 6 of his '822 patent. Mr. Paulucci testified that, after examining the photographs of Exhibits 1 and 2 to the Appellant's November 27, 2001 Declaration, the photograph of Exhibit 2 "reflects the crust resulting when the method of Example 6 of his '882 patent is employed". The Examiner discounted the Declaration of Mr. Paulucci as well.

The Examiner appears to be overly concerned with the statement in the Paulucci '882 patent at column 9, line 65, that the crust made in accordance with Example 6 has "a flaky, airy interior". See paper no. 19, at page 2. The Board will recognize that the characterization of having "a flaky, airy interior" is a relative one and it is clear from the photographic Exhibits 1 and 2 to Appellant's Declaration of November 27, 2001, that Appellant's crust has a **more** flaky, airy interior than is provided when the method of Example 6 of the Paulucci '882 patent is utilized. Thus, while Example 6 of the '882 patent may yield a flaky, airy interior with reference to the prior art to the '882 patent, the present invention described and claimed in the subject application is significantly more flaky and airy as evidenced by the two photographs.

It is to be further noted from Claim 12 that in the case of the present invention, the margarine layers are distributed between layers of an already proofed dough product. Likewise, independent claim 17 also specifies that proofing of the dough occur before application of the margarine layers and the folding operations. This is in contrast to the teachings of Example 6 of the Paulucci patent on which the Examiner relies. In Example 6 of the Paulucci patent, raw dough is first sheeted and then layered with shortening flakes between the layers of raw dough. The laminated structure is then subjected to a further sheeting operation and only then followed by the proofing step.

Stated somewhat more succinctly, the proofing in accordance with independent Claims 12 and 17 of the present application occurs before any lamination, docking or cutting. The proofing in the method described in Example 6 of the Paulucci patent occurs after the dough is sheeted. Technically, this is a significant difference. Not only are significantly different layering and sheeting equipment required, but proofing after sheeting is what gives the crust of Exhibit 2 to the Bubar Declaration its very breadly structure. Likewise, because the proofing in Appellant's process occurs before the

layering with extruded margarine and sheeting, it yields the croissant-type layered structure clearly seen in the photograph of Exhibit 1 to the Bubar Declaration.

Appellant's attorney submits that the evidence brought forth is more than sufficient to rebut the *prima facie* finding that Claims 12-20 now on appeal define an invention that would have been obvious at the time it was made to persons of ordinary skill in the field. The two Declarations made by Appellant and the further Declaration by Mr. Paulucci, the inventor named in the '882 patent, which is the only patent being cited, certainly outweighs the *prima facie* evidence of obviousness using a preponderance of the evidence standard. The record, as a whole, establishes that the substitution of layers of margarine between folded layers of previously proofed dough produce a significantly different crust texture than is achieved when shortening flakes are distributed between dough layers and later pressed into the dough itself before any proofing occurs as in the '882 patent.

The record further shows a measure of commercial success that the crust of the present invention enjoys. Once the present invention was made, the prior art method described in the Paulucci '882 patent was discontinued in favor of the crust produced in accordance with the present invention. When it is considered that Appellant's employer, who manufactures and sells literally thousands of frozen pizzas each day, would not have made the changeover unless the invention constitutes a significant improvement over the Paulucci '882 process. Also, almost ten years elapsed between the time the Paulucci invention was made and the time Appellant made his invention. Had Appellant's approach at substituting extruded soft margarine for flakes of shortening between layers of previously proofed dough been obvious, as the Examiner contends, it would have been adopted much earlier, given the improved quality of the resulting crust for use with mass production of frozen pizzas.

CONCLUSION

Appellant remains convinced that there is simply nothing in the cited reference which would have suggested the combination, including the modification required to produce Appellant's claimed subject matter. Appellant further believes that the Examiner has not sustained the burden for establishing and maintaining a *prima facie* case of obviousness, and, therefore, the rejection based on 35 U.S.C. §103(a) should not stand. The Appellant is convinced that the present claims are patentable and it is respectfully requested that the final rejection by the Examiner be reversed and the claims allowed.

Respectfully submitted,

NIKOLAI & MERSEREAU, P.A.

A handwritten signature in black ink, appearing to read "Thomas J. Nikolai". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

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APPENDIX A

Claims Under Appeal

12. A laminated crust dough comprising:

a multi-layered dough lamination incorporating a plurality of margarine layers distributed between layers of a proofed dough product, said lamination formed by forming the dough product into a sheet, extruding a margarine layer thereon, and manipulating the sheet and margarine to produce a folded dough having a plurality of margarine layers distributed between layers of the dough product.

13. The laminated crust dough of claim 12 wherein said sheet and margarine are manipulated by folding said sheet over said margarine layer to form a fatted dough, stretching said fatted dough into a fatted sheet using a first stretching means including a series of rollers applied to said fatted dough, distributing said fatted sheet onto a conveyor using a first piling means to overlap said fatted sheet on said conveyor; and reforming said fatted sheet to a predetermined thickness.

14. The laminated crust dough of claim 13 further comprising a plurality of punctured openings formed in said crust dough.

15. The laminated crust dough of claim 14 wherein said crust is formed into pizza shapes and baked in an oven.

16. The laminated crust dough of claim 14 wherein said dough product further comprises approximately 60 percent flour, 1.25 percent margarine and 32 percent water.

17. A laminated crust dough comprising a plurality of dough layers and a plurality of margarine layers distributed between layers of dough by

proofing a dough sheet;

extruding a margarine layer onto said dough sheet;

folding said sheet over said margarine layer to form a fatted dough;

stretching said fatted dough into a fatted sheet using a first stretching means, said first stretching means including a series of rollers applied to said fatted dough;

distributing said fatted sheet onto a conveyor using a first piling means to overlap said fatted sheet on said conveyor; and

reforming said fatted sheet to a predetermined thickness;

wherein said folding, stretching, distributing and reforming steps produce a folded dough having a plurality of margarine layers distributed between layers of dough.

18. The crust dough of claim 17 wherein the steps of reforming said fatted sheet to a predetermined thickness further comprises:

stretching said fatted sheet using a second stretching means, said second stretching means including a series of rollers;

distributing said fatted sheet onto a conveyor using a second piling means to overlap said fatted sheet on said conveyor; and

rolling said fatted sheet to a predetermined thickness using a plurality of second rolling means.

19. The crust of claim 17 wherein said first stretching means further comprises a series of rollers that are mounted for rotation over a conveyor.

20. The crust dough of claim 17 wherein said dough product further comprises approximately 60 percent flour, 1.25 percent margarine and 32 percent water.